APPEAL NO. 021907
FILED SEPTEMBER 16, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on June 18, 2002. In a prehearing conference, the hearing officer considered the response filed by the respondent (claimant) to the benefit review conference (BRC) report and after hearing argument, amended the "extent of injury" issue into a direct issue as to whether the claimant injured her cervical spine on _____. As a result of the CCH, the hearing officer held that the claimant injured her cervical spine on _____, by aggravation of a preexisting condition, and that she had disability from December 8, 2001, through the date of the CCH. On the issue of whether the appellant (carrier) was liable for payment of accrued benefits under Rule 124.3 for failing to dispute the cervical injury or initiate payment of benefits within 7 days after it received written notice of injury, she held that the carrier was so liable.

The carrier appeals all issues resolved in favor of the claimant, including the issue relating to rephrasing the issue reported from the BRC. The carrier also attaches what is argued to be "newly discovered evidence." The claimant responds with an extensive brief, arguing that the issue was accurately rephrased and that carrier should not seek to avoid the effect of waiver under Section 409.021 by being permitted to characterize the chief injury as an "extent" issue. The claimant responds that the issue of cervical injury was correctly decided and such "new evidence" cannot at this late date be considered.

DECISION

We affirm the hearing officer's decision on all point appealed.

FACTS

The claimant tripped on a rug and fell to the floor on _____, at her workplace. She said that she was shaken up but initially had no pain. The claimant nevertheless reported this incident to her supervisor, and said that she understood that the supervisor was probably filling out a Employer's First Report of injury or Illness (TWCC-1). However, the claimant said she did not report an ankle injury to the supervisor, that she was never treated for an ankle injury, and she did not understand why the TWCC-1 that was filed the next day by the employer characterizes her injury as an ankle injury.

In fact, the claimant worked the next day and said she felt pretty good, but by the end of the day was starting to experience upper extremity pain and weakness. The next day, the claimant said she was unable to use her arms and had numbness and tingling. She went to a hospital emergency room (ER) and called in to her supervisor to report why she would not be in to work that day. Records from this treatment were not in

evidence. The claimant said she returned to work the next day but because of progressive problems she testified that she was back at the ER on December 12, 2001.

However, records from an emergency center are dated December 10th, and reflect painless cervical range of motion but vertebral point tenderness in the lower cervical, upper thoracic, and lumbar spine, upper extremity weakness and numbness, and a fall at work the previous week. X-rays of the cervical spine showed degenerative disc disease and lumbar scoliosis. There is no treatment for any ankle injury reflected on this report. The history notes progressive weakness and muscle cramping in the extremities over the week since her fall. The problem areas are noted in the progress notes as cervical and lumbar spine. A neurological consultation was inconclusive on the etiology of the pain and weakness.

An admission neurosurgical consultation record from a hospital dated December 12, 2001, characterizes her injury as a hyperextension of the neck when she fell, resulting in progressive cervical myelopathy. This record also noted that the claimant had a "two week" history of progressive decline beginning "8 days ago." This report stated that an MRI showed multi-level cervical spondylosis, and recommended decompression surgery for the next week. The claimant had emergency cervical surgery on December 18, 2001. With no disrespect to the claimant, we observe that her medical records characterize her as morbidly obese and 56 years old. The claimant said she had no cervical pain at all prior to her fall.

On December 14, 2001, the carrier filed a Payment of Compensation or Notice of Refused/Disputed Claim (TWCC-21) that accepted an ankle injury but disputed a "back" injury based upon preexisting condition. This form stated that the carrier received first written notice of injury on December 4, 2001. No benefits were initiated on this form, which also disputed disability.

On December 17, 2001, the carrier's adjuster hired a nurse case manager, who visited the claimant in the hospital on December 18, 2001; her notes indicated that the claimant was still groggy. The claimant recalled nothing of this visit. The case manager's notes show active investigation of the injury and pertinent medical records beginning from the date of hire.

The claimant filed an Employee's Notice of Injury or Occupational Disease and Claim for Compensation (TWCC-41) on January 17, 2002, asserting a cervical injury on _____, from which she first began losing time on December 14, 2001. The carrier's TWCC-21 was amended on February 8, 2002, to specifically include the neck. This followed an evaluation for the carrier by Dr. C of the medical records of the claimant. Dr. C's January 22, 2002, report, which fails to mention any ankle injury, opines that the cervical injury results from a preexisting progressive condition. He argued that several doctors had documented extensive preexisting disease. How extensive such documentation is, however, is conflicting and a matter for factual resolution by the hearing officer. One report relied on by Dr. C is the December 12 2001, report that claimant had a "two week history beginning about eight days ago."

Medical treatment records in February, March, and April indicate that the claimant continues to have neck and back pains with radiation into her extremities. There are no medical records prior to the date of injury showing any symptoms relating to her neck; the carrier dispute that such condition is preexisting was based upon two notes in a history taken by one doctor that she may have had "symptoms going on" prior to her fall.

PRELIMINARY HEARING TO THE CCH

There was a prehearing conference preceding the CCH due to the fact that the claimant's response to the BRC report stated that the "extent of injury" issue did not properly reflect that the dispute involved one of compensability of the primary injury. After hearing argument and some evidence on the facts underlying the party's positions on this issue, the hearing officer agreed that, given the facts of the case, the cervical injury was the principle injury being disputed and that it was not properly characterized as an extended injury from the alleged ankle injury. We should note that the claimant had subpoenaed the adjuster to appear at the CCH and served her through the carrier's attorney per agreement. However, the attorney announced that the adjuster did not intend to personally appear and that she in any case was beyond the mileage limit to compel her appearance. Although the carrier agreed to make her available by telephone, she was not called as a witness. The claimant's request for a continuance to personally compel her testimony for live observation by the hearing officer was not granted.

CERVICAL INJURY AND DISABILITY

We find no error in the record in the hearing officer's determination on the cervical injury and related disability issues. It is axiomatic, in case law having to do with aggravation, that the employer accepts the employee as he or she is when he or she enters employment. Gill v. Transamerica Insurance Company, 417 S.W.2d 720, 723 (Tex. Civ. App.-Dallas 1967, no writ). An incident may indeed cause injury where there is preexisting infirmity where no injury might result in a sound employee, and a predisposing bodily infirmity will not preclude compensation. Sowell v. Travelers Insurance Company, 374 S.W.2d 412 (Tex. 1963). However, the compensable injury includes these enhanced effects, and, unless a first condition is one for which compensation is payable under the act, a subsequent carrier's liability is not reduced by reason of the prior condition. St. Paul Fire & Marine Insurance Company v. Murphree, 357 S.W.2d 744 (Tex. 1962). In considering all the evidence in the record, we cannot agree that the findings of the hearing officer are so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). In addition, the case for the inability to work (disability, as defined in the act) as a result of the cervical surgery is supported by the medical evidence and testimony in this case. We affirm the decision and order.

NEW EVIDENCE ATTACHED TO THE APPEAL

The carrier has attached records relating to the first ER treatment of the claimant, asserting that the late receipt of these records through its nurse case manager was "a surprise." There was, however, no contention made during the CCH that the claimant failed to disclose her ER treatment and in fact, she testified that she informed her supervisor of such treatment when she called in to report she would not be at work on December 5, 2001.

Much of the thick pile of medical records attached does not relate to the purported initial visit, however, but to subsequent treatments for which there is already evidence in the record. The eight pages of records relating to the early December treatment are asserted by the nurse case manager to have been previously "unknown" to her and undisclosed by the hospital until after the CCH. Although the carrier asserts that these records are critical in showing a preexisting condition, the hearing officer has already concluded from the evidence before her that the claimant had preexisting cervical conditions. The review of the Appeals Panel is generally limited to the record developed at the hearing. Section 410.203. In determining whether new evidence submitted with an appeal requires remand for further consideration, the Appeals Panel considers whether the evidence came to the knowledge of the party after the hearing, whether it is cumulative of other evidence of record, whether it was not offered at the hearing due to a lack of diligence, and whether it is so material that it would probably result in a different decision. *See* Texas Workers' Compensation Commission Appeal No. 93536, decided August 12, 1993. Considering these factors, we cannot agree that the belatedly presented records compel a reversal and remand of this case.

AMENDING OF THE ISSUE ON EXTENT

Given the fact that the hearing officer determined that the cervical injury was compensable, by way of aggravation of a preexisting condition, the issues relating to payment of medical benefits and timely contest are somewhat moot. The cervical injury is compensable according to the hearing officer's decision, whether or not waived and whether or not characterized as the primary injury or an "extent" of injury.

However, to forestall the Texas Supreme Court decision in Continental Casualty Company v. Downs, No. 00-1309 (June 6, 2002) from inspiring a rash of "extent" issues in the dispute resolution system, we will respond to the carrier's contention that the hearing officer erred in converting the reported "extent of injury" issue regarding the cervical spine into a straight compensability issue. We find no error on the hearing officer's part, and, under the facts of this case, affirm her recasting of the erroneously reported issue as well taken.

We agree that the 1989 Act does not contemplate multiple notices of injury and responses thereto. It is the first written notice of an injury, not discovery of facts constituting a defense, which begins the 7- and 60-day deadlines set out in Section 409.021. Tex. W.C. Comm'n, 28 Tex. Admin. Code § 124.1(a) (Rule 124.1(a)); Texas Workers' Compensation Commission Appeal No. 93967, decided December 9, 1993. The Appeals Panel has held that the TWCC-1 is, by definition under Rule 124.1, the first

written notice of injury, and where one is filed, no resort to other records which fairly inform the carrier of injury need be made to calculate the deadlines. The TWCC-1 is not the last word on the scope of the injury that actually occurred. Texas Workers' Compensation Commission Appeal No. 992626, decided December 31, 1999 (Unpublished).

It is the carrier's active investigation upon receipt of the TWCC-1 that should supply the diagnoses and scope of the reported injury. Texas Workers' Compensation Commission Appeal No. 962210, decided December 18, 1996 (Unpublished); Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002. The record in this case contained no cogent reason why the employer listed the injury as an ankle injury on its TWCC-1; the claimant said she did not report her injury to the employer that way and she received no medical treatment for any "ankle" injury, and this latter point is borne out by the medical records in the case. It is clear that the primary and medically-treated injury from the fall was a cervical injury and nothing else, and medical records indicating this were available to the carrier at the time it filed its TWCC-21. (We observe that even with respect to an ankle injury, the TWCC-21 was filed more than 7 days after the carrier stated that it received first written notice of injury). Indeed, the fact that the TWCC-21 disputes the cervical injury shows that the carrier in fact had such records at the time the TWCC-21 was filed on December 14, 2001.

The Appeals Panel has recently dealt with the recasting of a primary injury as an "extent" issue in Texas Workers' Compensation Commission Appeal No. 021569, decided August 12, 2002 and said:

> Although [Rule 124.3(c)] states that 409.021 does not apply to an "extent of injury" dispute, the rule cannot be interpreted in a way that would simply allow a dilatory carrier to recast the primary claimed injury issue as an "extent issue" and thereby read the mandates of Section 409.021 out of existence entirely. As the preamble to the Rule notes:
>
> > Section 409.021 is intended to apply to compensability of the injury itself or the carrier's liability for the claim as a whole, not individual aspects of a claim.
>
> However, characterization and acceptance of an injury as a strain will not serve to convert the primary injury into an "individual aspect" for purposes of circumventing the requirements of Section 409.021. *See* Texas Workers' Compensation Commission Appeal No. 93491, decided August 2, 1993.

The Texas Workers' Compensation Commission is without legal authority to repeal a statute by a rule and we cannot interpret the rule in a way that would have the effect of negating the language and intent of Section 409.021. The hearing officer indicated her understanding that an "extent of injury" as a concept applied to those

conditions that naturally resulted from the initial damage or harm, or those injuries that were not manifested within the first 7 days that a carrier is given to react to the written notice of injury. This is a factual determination. We cannot agree with the carrier's assertion, especially given the lack of a statutory definition of extent of injury, that the cervical injury in this case was, as a "matter of law," one that the carrier was not obligated to dispute along the requirements of Section 409.021. Accordingly, we affirm the recasting of the issue to more accurately reflect the dispute over the cervical injury.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

CORPORATION SERVICE COMPANY
800 BRAZOS, COMMODORE 1, SUITE 750
AUSTIN, TEXAS 78701.

_____
Susan M. Kelley
Appeals Judge

CONCUR:

_____
Gary L. Kilgore
Appeals Judge

_____
Robert W. Potts
Appeals Judge